Supreme Court, U.S.
F I L E D
JAN 16 1986
JOSEPH F. SPANIOL,
CLERK

No. 85-873

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LUIS M. CAMACHO, DON C. WARNER, BERTHA L. DUENAS, FRANK C. CRUZ, and JESUS B. PAULINO,

Petitioners

v.

WILLIAM K. BUNYAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. U. TORRES
T.S. Tanaka Building, Suite 102
P.O. Box 1268
Agana, Guam 96910
(671) 472-2229

Attorney for Petitioners

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TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case

Petitioners accept Respondent's Statement of the Case as presented in his Brief In Opposition. In accordance with Supreme Court Rule 34.2, a Statement of the Case is therefore omitted here.

Constitutional and Statutory Provisions Involved 1

Argument

I. Fiscal importance has been recognized by this Court as a basis for granting certiorari 3

II. The retrospective application of § 8113(b) is supported by a rational basis other than the legislature's desire to create an incentive for its citizens to return to Guam. . 5

III. The situations in Zobel and Hooper are distinguishable from the present facts 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
Brandwein v. California of Osteopathic Examiners, 708 F.2d 1466 (9th Cir. 1983)	9
Hooper v. Bernalillo County Assessor, 53 U.S.L.W. 4827 (U.S. June 24, 1985)	6,12 14,15
Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979)	6
Regan v. Taxation w. n Representation of Wash., 461 U.S. 540 (1983)	6
Shapiro v. Thompson, 394 U.S. 618 (1969)	13
Territory of Alaska v. American Can Co., 358 U.S. 224 (1959)	4
Zobel v. Williams, 457 U.S. 55 (1982)	12,15
Constitutional Provisions	
Equal protection clause of the fourteenth amendment to the United States Constitution	6,10
Statute	
Guam Gov't Code title IV, § 8113	passim

CONSTITUIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amendment 14 (applicable part):

> No state shall . . . deny any person within its jurisdiction the equal protection of the laws.

Guam Gov't Code Title IV, § 8113:

Any bona fide resident of Guam, who receives his graduate of undergraduate degree from an accredited institution and is employed by the government of Guam after obtaining such degree, may claim retirement credit equal to the period of time, including vacations, which a full-time student would normally take to complete the program leading to the degree he received, or any lesser period he may elect to claim, by paying to the Fund the appropriate member's and employer's shares based on the period of credit sought to be obtained and his salary when he begins employment with the government

of Guam; provided, however, that this Section shall apply only to those persons:

(a) who received their degrees after June 1, 1945;

(b) who were bona fide residents of Guam at the time they began their undergraduate studies; and

(c) who had been employed by the Government for at least ten (10) years as full-time, locally hired employees.

ARGUMENT

I.

FISCAL IMPORTANCE HAS BEEN RECOGNIZED BY THIS COURT AS A BASIS FOR GRANTING CERTIORARI.

The Respondent argues that the retrospective application of Guam Gov't Code § 8113(b), which limits the added retirement credit to those who were residents of Guam when they began their college education, is unconstitutional because "A government may not legitimately attempt to limit its expenditures by discriminating between classes of its own citizens" (Respondent's Brief in Opposition, Section 1 at 7). Petitioners agree that the need to limit expenditures cannot justify discrimination. However, this is completely unrelated to the point that Petitioners wish to make. Petitioners merely assert that because there is a potential under the Circuit Court's decision for an increase

in expenditure to the point that the retirement credit program might be dropped, the issue is of such importance to the Territory of Guam that this Court should grant the writ of certiorari. Petitioners are not arguing that the Government of Guam's desire to limit its expenditures justifies any exercise of unconstitutional discrimination between the classes of its citizens. Rather, Petitioners assert that because a significant financial burden is at stake here, the importance of the issue is so great that this Court should grant the writ in order to decide if the discrimination in question is indeed unconstitutional.

Fiscal importance has been explicitly recognized by this Court as a basis for granting certiorari. In Territory of Alaska v. American Can Co., 358 U.S. 224 (1959), the

issue was whether Alaska's right to collect past amounts due on a general property tax survived the repeal of the tax.

> The case is here by a petition for writ of certiorari which was granted in view of the fiscal importance of the question to Alaska. 356 U.S. 926, 78 S.Ct. 717, 2 L.Ed.2d 758.

Id. at 225.

II.

THE RETROSPECTIVE APPLICATION OF § 8113(b) IS SUPPORTED BY A RATIONAL BASIS OTHER THAN THE LEGISLATURE'S DESIRE TO CREATE AN INCENTIVE FOR ITS CITIZENS TO RETURN TO GUAM.

It is admitted by Petitioners that the selective retrospective application of § 8113(b) cannot very well encourage the return to Guam of one who was already residing there and had satisfied all of the requirements of § 8113, except that of § 8113(b), at the time of the provision's enactment. While the "incentive

to return" element cannot justify the retrospective application of § 8113, an alternative rational basis provides the support necessary to satisfy the equal protection clause of the fourteenth amendment to the U.S. Constitution. A state or territorial government has a perfect right to recognize and reward the contributions made or hardships suffered (or potentially suffered) by a limited segment of its citizenry. The most frequent examples of such rewards are those established by the states for war veterans. The general validity of such rewards has been clearly recognized. Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983); Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). Hooper v. Bernalillo County Assessor, 53 U.S.L.W. 4827 (U.S. June 24, 1985), one of the cases relied upon by

Respondent and discussed more fully, infra, implicitly recognizes the right of a state or territory to reward a limited portion of its population. Before discussing the direct connection between this rational basis and the retrospective application of § 8113(b), another point raised by the Respondent must be answered.

The Respondent (Brief in Opposition, § 3 at 9-10) calls into question the validity of the prospective application § 8113(b), which limits the reward of the added retirement credit to those who resided in Guam when they began their college education. The Respondent challenges the justification for favoring this sub-group of Guam citizens that is based on the greater familiarity of long-term residents with local problems and concerns and the resultant expectation that they would be more valuable government employees. This

challenge confuses matters because only the retrospective application of § 8113(b) is in question here; the prospective application of the general scheme of § 8113 is not at issue. It may be noted, however, that under the rational basis or relation test, the response to the Respondent's general challenge is that the Guam legislature's belief that those who were residents of Guam before they left for their college studies would tend to make superior government employees is not beyond reason.

> The plaintiff in a challenge to a legislative classification, reviewed under this [the rational basis] standard, must prove that the facts on which the legislature may have relied in shaping the classification "could not reasonably be conceived to be true by the governmental decisionmaker." Vance v. Bradley, 440 U.S. at 111, 99 S.Ct. at 949. "The admission that facts are arguable" is enough to justify the legislative judgment. Id. at 112,

99 S.Ct. at 950.

Brandwein v. California Board of Osteopathic Examiners, 708 F.2d 1466, 1470-71 (9th Cir. 1983).

As to the retrospective application of § 8113(b), the Respondent claims that because of his long-term residency on Guam, such application is unjustified in his case. This assertion entirely begs the question. As mentioned, supra, the purpose of applying § 8113(b) retrospectively is to reward those who complied with the terms of the provisions, thereby making a contribution and enduring a hardship that other citizens did not. The Respondent's long-term residency on Guam after the completion of his education has no relation to the purpose of § 8113(b). It may well be true that a person, such as the Respondent, who has lived and worked on Guam for an extended period after his

education has been completed will become as familiar with local problems as one who had been a resident of Guam prior to entering college and then returned to Guam. The Government of Guam may well regard a "post-education" long-term resident, such as the Respondent, as having the potential of being as valuable an employee as one whose residency on Guam began prior to college. However, the Government of Guam has chosen to reward only those meeting the latter requirement, bona fide residency on Guam at the time of starting undergraduate studies. The limitation of the reward to this group and its denial to those in the Respondent's position is, like the government's desire to attract such people back to Guam, supported by a rational basis that satisfies the equal protection clause. Those who have left Guam for

their college education and then have returned for government service have at least potentially suffered a hardship that a person who simply decides to work in Guam as a first-time resident has not. The Guam returnee is more likely to have decided to work for the Government of Guam for altruistic reasons such as loyalty to the place of his prior residency, if not birth, than would be true of a first-time resident. The Guam returnee, having received his education outside of Guam over a period of several years, is likely to have spurned more lucrative opportunities elsewhere. At least the Government of Guam, under the rational basis test, is entitled to view the returnee in this light if it so chooses.

III.

THE SITUATIONS IN ZOBEL AND HOOPER ARE DISTINGUISHABLE FROM THE PRESENT FACTS.

Zobel v. Williams, 457 U.S. 55 (1982) and Hooper v. Bernalillo County Assessor, supra, are not applicable to the present situation. These cases are more fully discussed in Petition at 8 et seq., but both involved residency requirements. In Zobel, the longer the citizen was a resident of Alaska, the greater the amount of his dividend under the state's scheme for distributing profits from natural resources. In Hooper, Vietnam War era veterans were exempt from property tax on $2,000 worth or realty, but only if they had been residents of New Mexico prior to May 8, 1976. In both cases this Court found that the distinctions based on residency were not rationally related to any state purpose. In Zobel, the one purpose

asserted by the state that is similar to the purpose for the retrospective application of § 8113(b), is the state's interest in rewarding citizens for past contributions. This Court rejected that purpose in Shapiro v. Thompson, 394 U.S. 618 (1969). In that case the recognition of citizens' prior contributions through the payment of taxes was rejected. Clearly, such an alleged contribution is far too vague to sustain a statutory distinction based upon it; in reality, a citizen's payment of his taxes is merely his compliance with a duty already owed. As discussed, supra, the return of a resident to Guam for government service after his education involves a voluntary act that potentially causes a significant sacrifice and hardship. The rewarding of such a distinct and affirmative act is clearly distinguishable from rewarding

a citizen's past compliance with the state tax laws.

Similarly, in Hooper this Court found that the pre-May 8, 1976 residency requirement was not rationally connected with the state's purpose of expressing gratitude to those residents of New Mexico whose lives were disrupted by the Vietnam War. While the Court recognized that resident veterans as a group could be recognized, it correctly denied that those veterans who resided in New Mexico prior to May 8, 1976 and then re-established their residency after their discharge were deserving of greater gratitude than those veterans who came to New Mexico after May 8, 1976 for the first time. As explained, supra, this reasoning should not govern the present situation because the returnees to Guam are, on a rational basis, worthy of greater gratitude than are those

who came to Guam for the first time when they entered government service. In Hooper, all resident veterans made the same sacrifice regardless of whether they were residents of New Mexico prior to May 8, 1976. In the present case, only those who were residents of Guam at the start of their college education potentially made the sacrifice that Guam has rewarded retrospectively under § 8113(b). This Court should not allow the striking down all distinctions made on the basis of residency simply because the trend is in that direction. By misapplying Zobel and Hooper, the Ninth Circuit Court of Appeals has blindly followed that trend, and this misapplication of the law should be corrected.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

J. U. Torres
T.S. Tanaka Building
Suite 102
Post Office Box 1268
Agana, Guam 96910
(671) 472-2229

Attorney for Petitioners